

Potential number of Article 36 claims brought by petitioners serving life sentences  
or on death row: statistics and estimates

1. Number of foreign nationals currently on death row (including *Avena* defendants)

- **133 reported** on the Death Penalty Information Center website, of whom 2 are believed by the compiler of that data to have acquired foreign nationality *after* their incarceration (Pablo Ibar, Florida and Michael Legrand, Louisiana).<sup>1</sup> According to the researcher, incomplete reporting from some states with large death row populations suggests that the **actual total is likely to be around 140 cases.**

2. Estimated number of death row inmates who could raise Vienna Convention claims

- Estimated by the researcher who compiles the DPIC data at **90 cases** (which includes all cases to date in which Article 36 violations have been raised or reported (79), plus a 15 per cent margin added to the total to account for incomplete reporting).
- However, a number of those prisoners are from countries that do not have an established record of providing forms of consular assistance capable of impacting on the outcome of a serious criminal case.
- The researcher thus believes that a more realistic estimate of potentially viable claims under the terms of the proposed legislation (i.e., where a colorable prejudice claim might exist) would be around **80 cases.**

3. Number of Mexican nationals on death row

- As of February 25, 2011, there were **58 Mexican nationals on death row** in the United States, with death sentences imposed from 1980 to 2010.<sup>2</sup>

4. Status of all *Avena* cases

Breakdown of the 51 cases in which the ICJ found one or more Article 36 violations (as of Feb. 25, 2011):

- Still on death row entitled to "review and reconsideration" of both conviction and sentence: **40 cases** (California: 25; Texas: 12; 1 each in Oregon, Nevada and Ohio).

<sup>1</sup> See DPIC, Reported Foreign Nationals on Death Row in the U.S.

<sup>2</sup> The total includes Pedro Hernandez Alberto (Florida), whose case does not involve a Vienna Convention claim, and Ramon Salcido Bojorquez, for whom the ICJ found that Mexico had not established an Article 36 violation.

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- No longer on death row, but still entitled to "review and reconsideration" of the conviction: **6 cases** (Texas, 2; Illinois, 2; 1 each in California and Arizona)
- *Avena* requirements no longer apply: **5 cases** (1 judicial determination of *Avena* prejudice only at penalty phase; 1 re-sentenced (mental retardation) after waiver of all appeals; 1 died on death row, 1 commuted and deported; 1 executed)

#### 5. Number of foreign nationals serving life sentences

- According to the U.S. Bureau of Justice Statistics, at midyear 2009, non-U.S. citizens made up 4.1% (94,498 inmates) of the state and federal custody populations.<sup>3</sup>
- According to a mid-2009 study by The Sentencing Project, 140,610 individuals are serving life sentences in the USA (including 41,095 LWOP cases).<sup>4</sup>
- Assuming that foreigners are serving life sentences proportionally to other inmates, that would mean there are **approximately 5765 cases of foreigners under some form of life imprisonment** (4.1% of 140,610).
- If 'life imprisonment' is interpreted as meaning 'life without parole sentences only' (which is arguably more consistent with *Avena*), the starting figure would drop to **around 1685 cases**.

#### 6. Estimated number(s) of foreign nationals serving life sentences who could raise VCCR violations (if the legislation were retroactively applied to individuals serving life sentences)

- Approximately 64% of death-sentenced cases are estimated to involve Article 36 violations (an estimated 90 out of 140 cases). Assuming the same non-compliance rate for life sentences as for death sentences, there would be **approximately 3690 life-sentenced cases involving Article 36 violations**.
- Using "life without parole sentences only" as the criterion, there would be **approximately 1078 cases involving Article 36 violations**.

<sup>3</sup> See *Prison Inmate Characteristics*, at <<http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=132NCJ 230113>> and *Prison Inmates at Midyear 2009 - Statistical Tables* (June 23, 2010), at <<http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>> (both last visited Feb. 27, 2011).

<sup>4</sup> See *No Exit: The Expanding Use of Life Sentences in America* (July 2009), at <[http://www.sentencingproject.org/doc/publications/publications/inc\\_noexitseptember2009.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf)>

7. Estimated number(s) of foreign nationals serving life sentences who could raise VCCR violations with colorable prejudice claims

- It is reasonable to assume that no more than 75% of the potential claims would involve countries with consular assistance programs capable of influencing the outcome of a serious criminal case.<sup>5</sup> Those are the cases most likely to produce a colorable showing of "actual prejudice" under the draft legislation, without which the claim would not be viable.
- Using the 75% ratio, there would be +/- **2768 cases of life sentences with potentially viable Article 36 claims**, or around **809 LWOP-only cases**.
- Adding the approximately 80 predicted death row cases with potentially viable claims results in a **grand total of around 2848 cases** (death and life sentences together) or **889 cases** (death and LWOP sentences together).

Given the proposed 1-year time limit on filing the claim and the fact that most non-death row prisoners are unrepresented, the actual number of filings would be significantly lower.

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<sup>5</sup> According to a 2005 GAO study, Mexicans represented 63% of foreign prisoners in federal system; apart from Colombia (7%), El Salvador (2%) and Guatemala (1%), no other nations with any form of consular assistance program with a legal assistance component contributed a statistically significant number to the total. See GAO-05-337R, *Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails* (April 7, 2005) at 16, available at <<http://www.gao.gov/products/GAO-05-337R>>

Edgar Arias Tamayo	Texas
TOTAL (Texas)	12
Carlos René Pérez Gutiérrez	Nevada
José Trinidad Loza	Ohio
Horacio Alberto Reyes Camarena	Oregon
TOTAL (other states)	3

No longer under death sentence ("review and reconsideration" for conviction only): 6

NAME	STATE	STATUS
Martín Raúl Fong Soto	Arizona	Juvenile offender, resentenced to life under <i>Roper v. Simmons</i>
Oswaldo Regalado Soriano	Texas	Juvenile offender, resentenced to life under <i>Roper v. Simmons</i>
Daniel Angel Plata Estrada	Texas	Re-sentenced to life on grounds of mental retardation, under <i>Atkins v. Virginia</i>
Gabriel Solache Romero	Illinois	Commutated to life by executive clemency
Juan Caballero Hernández	Illinois	Commutated to life by executive clemency
Constantino Carrera Montenegro	California	Death sentence reversed in federal habeas review; awaiting resentencing pending the outcome of the appeal of his conviction

*Avena* requirements no longer apply: 5

NAME	STATE	STATUS
José Ernesto Medellín Rojas	Texas	executed
Mario Flores Urbán	Illinois	deported after commutation and release
Oswaldo Torres Aguilera	Oklahoma	Commutated; judicial determination of <i>Avena</i> prejudice only at penalty phase
Rafael Camargo Ojeda	Arkansas	Re-sentenced (mental retardation) after waiver of all appeals
Miguel Angel Martínez Sánchez	California	Died on death row

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Additional information is available at the Department of Justice, Washington, D.C.